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IN THE

Supreme Court of the United States

October Term, 1954

No. 811

ISADORE BRILL, Trustee in Bankruptcy of Phillip's, Inc., etc. *Petitioner*

v.

COHEN & MILLER ADVERTISING, INC., ET AL *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON 1, D. C.

CONTENTS

	PAGE
Opinion Below	1
Jurisdiction	2
Question Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	4
Conclusion	8
Appendix A (Opinion of U. S. Court of Appeals)	9
Appendix B (Statute)	11
Appendix C (Judgment of U. S. Court of Appeals)	12

Citations

Grant v. First National Bank, 97 U.S. 80, 24 L.Ed. 971	5, 6, 8
In re M & M Manufacturing Co., 71 Fed. (2d) 140	6
Barbour v. Priest, 103 U.S. 293, 26 L.Ed. 478	6
Stucky v. Masonic Savings Bank, 108 U.S. 74, 27 L. Ed. 640	6
Cunningham v. Brown, 265 U.S. 1	6, 7

Statutes

Bankruptcy Act of 1938, as amended, Sections 60 (a) and (b) (United States Code, Title 11, Chapter 6, Sec. 96)	4, 7

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Isadore Brill, Trustee in Bankruptcy of Phillip's, Inc., etc., petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above cause on February 24, 1955.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, infra, p. 9) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on February 24, 1955. The jurisdiction of this Court is invoked under Sec. 24 of the Bankruptcy Act, 1938 as amended (United States Code, Title 11, Chapter 4, Sec. 47 c.)

QUESTION PRESENTED

The question presented is whether the evidence is sufficient to support the findings of fact upon which the trial court found that the payment to Cohen & Miller Advertising, Inc. did not constitute a voidable preference under Secs. 60(a) and 60(b) of the Bankruptcy Act.

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Act of 1938, as amended, Sections 60 (a) and (b), (United States Code, Title 11, Chapter 6, Sec. 96) are set forth in Appendix B, infra p. 11.

STATEMENT

Prior to May 4, 1953, Phillip's Television and Appliances, Inc., was engaged in the business of selling television and electrical appliances in the Washington area through the medium of a chain of retail stores.

In the conduct of its business, Phillip's Television and Appliances, Inc. maintained a system of advertising which included the Washington Times-Herald Newspaper. In its arrangement with the Times-Herald it received periodic rebates representing allowances made to it because of a reduction in rate based upon volume.

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Phillip's Television and Appliances, Inc. employed Cohen & Miller Advertising, Inc., respondent herein, as its advertising agent in connection with its advertising program.

On May 4, 1953, the Washington Times-Herald issued its check for $5,830.16 made payable to Phillip's Television & Appliances, Inc., as a rebate.

On May 8, 1953, Phillip's Television and Appliances, Inc. endorsed the aforesaid check which it had received from the Washington Times-Herald as a rebate and delivered the same to the Cohen & Miller Advertising, Inc. as a payment on account of a past due indebtedness.

On May 8, 1953, the same day on which Cohen & Miller Advertising, Inc., received the aforementioned Times-Herald check from Phillip's Television & Appliances, Inc., it deposited the said check to its account at the Lincoln National Bank.

On May 9, 1953, at 9:30 A.M. o'clock, Phillip's Television & Appliances, Inc. filed in the United States District Court for the District of Columbia its petition under Chapter XI of the Bankruptcy Act seeking an arrangement with its creditors.

On May 11, 1953, the Washington Times-Herald instructed its bank to stop payment on the aforementioned check to Phillip's Television and Appliances, Inc. drawn May 4, 1953.

On June 30, 1953, Phillip's Television & Appliances, Inc. was adjudicated a bankrupt.

Thereafter, Cohen & Miller Advertising, Inc. brought an action in the United States District Court for the District of Columbia against the Washington Times-Herald seeking to recover on the aforesaid check.

On July 31, 1953, the United States District Court for the District of Columbia granted leave to Isadore Brill, Trustee in Bankruptcy of Phillip's Television and Appliances, Inc. to intervene in the action brought by Cohen & Miller Advertising, Inc., against the Washington Times-Herald aforesaid.

On May 5, 1954, the aforesaid action was tried in the United States District Court for the District of Columbia before the Court without a jury. The Court found in favor of Cohen & Miller Advertising, Inc. for the full amount of $5,830.16 as claimed.

On February 24, 1955, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the trial court.

Intervention by the Trustee in Bankruptcy was granted by the United States District Court for the District of Columbia by virtue of Sec. 23 of the Bankruptcy Act, 1938 as amended (United States Code, Title 11, Chapter 4, Sec. 46).

REASON FOR GRANTING THE WRIT

The sole issue in this case is whether the evidence is sufficient to support the findings of fact upon which the trial court concluded that the payment to Cohen & Miller Advertising, Inc., the appellee below, and the plaintiff in the trial court, did not constitute a voidable preference under Sec. 60 (a) and 60 (b) of the Bankruptcy Act. The United States Court of Appeals for the District of Columbia held that the evidence was sufficient and affirmed the judgment of the trial court.

The law applicable to this issue is clear. A reading of the Act will quickly display that actual knowledge of insolvency by the creditor is not essential. The creditor comes within the inhibitions where the substantial facts

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are of such significance as fairly to warrant the inference that he knew or ought to have known of the bankrupt's financial condition. The nature of reasonable cause to believe a debtor insolvent was defined by this Court in *Grant* v. *First National Bank,* 97 U.S. 80, 24 L.Ed. 971.

At the outset it should be made clear that the petitioner does not attack the veracity or credibility of any of the testimony adduced in the trial court nor does it attempt to contradict any of the evidence. All of the testimony, as adduced, is admitted. It is the petitioner's contention that the trial court should be reversed in that the uncontradicted evidence clearly shows that the respondent had reasonable cause to believe the debtor to be insolvent. No conflicts in evidence are requested to be resolved. The question is merely as to the proper deductions or inferences to be made from undisputed facts.

If a review of this case is permitted by this Court, your petitioner will show a close, cordial and personal relationship between the principals of the respondent and the principals of the bankrupt; the admitted desire of the bankrupt to assist the respondent; the fact that the principals of the respondent knew as much concerning the financial condition of the bankrupt as did the bankrupt; the attendance by the respondent at two creditor's meetings; the statement by the respondent that it had known for more than 6 months of the financial condition of the bankrupt; the time, mode and circumstances surrounding the transfer of a third party's check; the absence of payment to other creditors during the period; the filing of a Chapter XI petition on the day immediately following the subject transfer, and the fact that at the very moment when all of the principals of both the respondent and the bankrupt were present to effect the transfer, the necessary documents were being prepared for filing the petition. Your petitioner contends that these facts clearly disclose a situation in which the respondent was placed upon notice

of the debtor's insolvency, or at the very least, would have put the respondent to inquiry, which would have disclosed insolvency.

It is true that when the trier of facts makes a decision upon conflicting testimony involving the credibility of witnesses, his findings should be upset only in exceptional circumstances. But where his ultimate findings are based upon inferences drawn from substantially undisputed facts, they need not be accorded so conclusive an effect by the reviewing tribunal. *In re M & M Manufacturing Co.*, 71 Fed. (2d) 140.

Since the decision of *Grant* v. *First National Bank*, supra, in the October, 1877 term of this Court, your petitioner has been only able to find the following decisions in which this Court has passed upon the point. *Barbour* v. *Priest*, 103 U.S. 293, 26 L.Ed. 478, decided in October, 1880 and *Stucky* v. *Masonic Savings Bank*, 108 U.S. 74, 27 L.Ed. 640, decided in 1883. The issue was briefly touched upon in *Cunningham* v. *Brown*, 265 U.S. 1, decided in 1924. Numerous decisions through the Circuit Courts of Appeals are available, each of course, dealing with various factual situations, some in which preferences were held voidable, others not voidable. While your petitioner does not argue with nor question the reasoning or merit of the decision of *Grant* v. *First National Bank*, supra, it is believed that both the trial court and the Court of Appeals have read more into this opinion than was intended. In the past 50 years there have been many changes in commercial business practices, information is more readily obtainable, the naive business man is a character of the past. A more enlightened and realistic approach and application of modern modes of conduct must be applied to a situation of this nature.

To permit a holding in this case to the effect that the respondent did not come within the inhibitions of the Act;

that the facts as adduced are of not such significance as to fairly warrant the inference that the respondent knew, or ought to have known, of the bankrupt's financial condition; or to deny that the facts raised more than suspicion of danger to put the creditor upon inquiry touching the debtor's insolvency, would render Secs. 60 (a) and 60 (b) of the Bankruptcy Act completely nugatory. It is respectfully submitted that if this decision is permitted to stand, without a review by this Court, for all intents and purposes a trustee in bankruptcy would be compelled to prove actual knowledge before he could prevail in an effort to recover a voidable preference. With complete candor, your petitioner can not visualize of a factual situation, short of actual knowledge of insolvency, which would compel a finding that a voidable transfer was effected, stronger than the facts presented in this case.

As was stated by this Court in *Cunningham* v. *Brown*, supra, at page 13 of the U.S. Reports, "It is a case the circumstances of which call strongly for the principal that *equality is equity, and this is the spirit of the bankrupt law*. Those who were successful in the race of diligence violated not only its spirit but its letter and secured an unlawful preference." (emphasis added) To permit the respondent to prevail in this case, is to permit this creditor by virtue of its conduct to prevail over numerous other creditors in the same position.

Admittedly the question of reasonable cause to believe a debtor insolvent is as nebulous a theory as the question of reasonable conduct in the determination of a personal injury or negligence claim. Problems of reasonable conduct arise in many fields of the law. In such cases the questions to be determined are generally treated as questions of fact. However to deny a review of this case and to foreclose the petitioner an opportunity to present facts, so compelling, as it believes to warrant a reversal, would

result, in so far as at least the District of Columbia is concerned, in an interpretation of *Grant* v. *First National Bank,* far more stringent than the writer of that opinion could have possibly anticipated and leave the trustee in future cases absolutely without remedy lest he prove actual knowledge.

CONCLUSION

It is submitted that the serious question of law involved in this application is of sufficient importance to require the exercise of this Court's supervisory jurisdiction by a Writ of Certiorari.

Respectfully submitted,

LEON M. SHINBERG,
Attorney for Isadore Brill,
Trustee in Bankruptcy of
Phillips, Inc., etc.
Petitioner

APPENDIX A

Opinion of the United States Court of Appeals
for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12385

ISADORE BRILL, Trustee in Bankruptcy for Phillip's Television and Appliances, Inc.,, APPELLANT

v.

COHEN & MILLER ADVERTISING, INC., WASHINGTON TIMES-HERALD, INC., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided February 24, 1955

Mr. Leon M. Shinberg for appellant.

Mr. Marc A. White, with whom *Mr. James R. Sharp* was on the brief, for appellee Cohen & Miller Advertising, Inc.

No appearance for appellee Washington Times-Herald, Inc.

Before EDGERTON, PRETTYMAN, and BAZELON, Circuit Judges.

PER CURIAM: The sole issue is whether the evidence is sufficient to support the findings of fact upon which the trial court concluded that the payment to appellee Cohen & Miller Advertising, Inc. "constituted a preference but not a voidable preference under the Bankruptcy Act." Since we think the evidence is sufficient, the judgment below is

Affirmed.

APPENDIX B

Bankruptcy Act of 1938, as amended, Sec. 60 (United States Code, Title 11, Chapter 6, Sec. 96)

"a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class.

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bonafide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: Provided, however, That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction."

APPENDIX C

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,385 January Term, 1955

ISADORE BRILL, Trustee in Bankruptcy
for Phillip's Television and Appliances, Inc.,
APPELLANT,

v.

COHEN & MILLER ADVERTISING, INC.,
WASHINGTON TIMES-HERALD, INC.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Before: EDGERTON, PRETTYMAN, and BAZELON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, It is ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed with costs.

Dated: February 24, 1955.

PER CURIAM